



# Conventions in Court

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## Conventions in Court

Adrian Vermeule\*

In the Commonwealth nations, a constitutional “convention” denotes an unwritten but obligatory constitutional custom or norm. Leading examples are the conventions that the Queen act only on ministerial advice, and that whichever party obtains a majority in the House of Commons is entitled to form a government. Such rules are not written down in any authoritative enacted source of law, but they are fundamental to the operation of the British constitution. Other Commonwealth nations have similar unwritten rules.

In the United States, it has recently become clear that – despite the existence of a written constitution – conventions are essential to the operation of the U.S. constitutional regime, including the administrative state. This revelation bursts upon American constitutional scholars every other generation or so,<sup>1</sup> and is lost in the succeeding generation. Perhaps because of this oddly intermittent collective memory, there is no full-dress treatment in the U.S. constitutional law literature, as far as I am aware, of a critical set of questions on which Commonwealth theorists have thought very deeply: whether and when conventions should be enforceable in court. There is discussion of bits and pieces of the question under various rubrics, such as legislative acquiescence,<sup>2</sup> “glossing” the Constitution through practice or custom, and so forth.<sup>3</sup> However, in the view I will sketch, these are only particular aspects or special cases of the larger problem.

The question I will address is whether public law in the United States should be understood to permit, require or forbid federal courts to incorporate conventions into their decisions. My major claim is that public law should adopt an approach that has achieved

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<sup>1</sup> KARL N. LLEWELLYN, *THE THEORY OF RULES* (Frederick Schauer ed.) (2011).

<sup>2</sup> Curtis A. Bradley and Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012); Alison L. LaCroix, *Historical Gloss: A Primer*, 126 HARV. L. REV. F. 75 (2012-2013).

<sup>3</sup> See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring); *Mistretta v. United States*, 488 U.S. 361, 401 (1989); *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981).

consensus status in the United Kingdom and Commonwealth – what I will call the “modern Commonwealth view.” This approach holds that while courts may and should recognize conventions, they may not and should not enforce them. (In an alternative description, courts may enforce conventions “indirectly” but not “directly.” That alternative description is substantively equivalent for my purposes, as explained later; it makes no practical difference which formulation one prefers.)

I will illustrate and clarify the distinction between recognition and enforcement in what follows. The important point is that the main strength of the modern Commonwealth view is that it is not either of two other leading views, which I will call the “classical Diceyan view” and the “incorporationist view” respectively. The classical Diceyan view, which attempts to ignore conventions altogether, is untenable in the conditions of the modern administrative state. On the other hand, the incorporationist view, which is hospitable to vigorous judicial enforcement of conventions, is suspect on democratic grounds. Conventions are obligations that arise in a decentralized fashion, welling up out of the equilibrium interaction of political forces; that feature undermines the deliberateness, responsiveness and accountability that lawmaking in a democratic constitutional order requires.

I will argue that the two competing views are untenable in the modern administrative state, and that the modern Commonwealth view triumphs *faute de mieux* – for lack of a better, or even any feasible, alternative. Moreover, I will claim that in important cases, especially recent cases, the U.S. Supreme Court has implicitly moved toward just this approach. Although U.S. law is hardly uniform or consistent on the subject, adopting the modern Commonwealth view in the U.S. would not represent a radical novelty.

It is tempting to assume that the best approach to conventions somehow must differ between Commonwealth settings and the U.S. setting because of the large background differences between the U.S. public law regime and typical Commonwealth regimes. The U.S. has distinctive features such as a formal separation of executive and legislative powers, and a written constitution that purports to be comprehensive (although it is not, as we will see). The Commonwealth regimes typically feature parliamentary government, and in many cases, specifically the United Kingdom, New Zealand, and Canada, the constitution is either unwritten or, at most, only partially codified. Despite these important background differences, however, I

believe that the treatment of conventions has tended and in fact should tend to converge across systems because of one massive feature the systems share: the administrative state. The network of statutes and regulations, including both ordinary statutes and quasi-constitutional statutes, has grown so dense in both systems that it is no longer possible for conventions to remain in a separate realm outside the legal system. In either regime, courts interpreting written constitutional provisions, statutes or regulations have no choice but to navigate through and around conventions, and in order to do so, courts must recognize conventions. Yet courts are under no such necessity to actively enforce conventions, and I will argue that on normative grounds they should not.

It should be apparent that the argument for the modern Commonwealth view will have a distinctly nonideal cast. Given the constraints that courts face in the administrative state, the best of the feasible alternatives is to recognize conventions but not enforce them. The modern Commonwealth view, in other words, is an unhappy compromise among competing considerations; its final, and indeed only, real virtue is that it is less unhappy than the competing views. Though this claim is not inspiring, I hope that it is true.

Part I will briefly lay out some necessary background, including a definition of conventions, a taxonomic framework for discussing conventions, and an explanation of the competing approaches I will discuss. Part II explains the institutional and normative problems – in my view insuperable problems – that afflict both the classical Diceyan view of convention and the incorporationist view, for different reasons. The modern Commonwealth view prevails on nonideal grounds, as the best feasible approach given the constraints under which courts operate in the administrative state. A brief conclusion follows.

### I. Background

#### A. What Are “Conventions”?

In the American constitutional order, it is a mistake to think that all constitutional rules are written. First of all, there is a domain of “constitutional common law” made by judges deciding federal constitutional questions.<sup>4</sup> Such law is in one sense written down in judicial opinions, but is unwritten in another deeper sense, insofar as – on one important view -- the rules

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<sup>4</sup> Henry P. Monaghan, *The Supreme Court 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 43 (1975); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

of common law have no single authoritative formulation.<sup>5</sup> Bracketing questions about the status of constitutional common law, however, there is a large body of constitutional rules that are even more clearly unwritten. Here are some standard examples. In a number of cases I will leave out, for now, exceptions and complications that I will mention later in the discussion:

- Before Franklin Roosevelt obtained a third consecutive presidential term in 1940, there was a convention holding that no one could be elected to more than two terms – because George Washington had stepped down after his second.<sup>6</sup>

- Although the constitutional framers expected that members of the Electoral College would vote independently, by the middle of the 19<sup>th</sup> century it had become a firm convention that electors were duty-bound to vote for the candidate of the party who selected them.<sup>7</sup>

- Under Thomas Jefferson, it became a convention that the President would not offer the State of the Union Address orally in person, but would communicate it in writing. The convention was stood on its head when Woodrow Wilson delivered the address in person; the current convention is that it is obligatory for the President to do so.<sup>8</sup>

- For some period of time starting in the 1990s, the Republican Party in the House of Representatives, when it controlled the House, followed an internal convention called the “Hastert Rule”: no legislation would be approved unless a majority of the majority party voted in favor. The convention thus excluded approval by a majority comprising the minority party plus a minority of the majority party.<sup>9</sup>

- Administrative lawyers define an “independent” agency as an agency whose heads cannot be discharged at will by the President. Although relevant statutes do not give any such tenure protection to the Chair of the Federal Reserve or to the Commissioners of the Securities and Exchange Commission, both are universally understood to be independent agencies. Their

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<sup>5</sup> Frederick Schauer, *Is the Common Law Law?*, 77 CAL. L. REV. 455 (1989).

<sup>6</sup> Bruce G. Peabody & Scott E. Gant, *The Twice and Future President: Constitutional Interstices and the Twenty-Second Amendment*, 83 MINN. L. REV. 565 (1998-1999).

<sup>7</sup> Note, *State Power to Bind Presidential Electors*, 65 COLUM. L. REV. 696 (1965).

<sup>8</sup> Adrian Vermeule, *The Small-C Constitution, Circa 1925*, JOTWELL CLASSICS, (Oct. 27, 2010), <http://classic.jotwell.com/the-small-c-constitution-circa-1925/>.

<sup>9</sup> Sotirios A. Barber, *Toward a More Responsible Congress? Congress and Responsible Government*, 89 B.U.L. REV. 357 (2009).

independence rests on an unwritten convention that protects them from discharge without cause, whatever the relevant statutes say.<sup>10</sup>

- The Justices of the Supreme Court follow a “Rule of Four” for deliberation on certiorari petitions. Although technically speaking the Court acts by majority vote, if there are four votes to grant a petition, it will be deemed granted. (The underlying fiction seems to be that one of the Justices in the five-member bloc who voted to deny certiorari will switch to provide the necessary additional vote.) The Rule of Four is wholly unwritten.<sup>11</sup>

Do these unwritten rules have any common features? How, if at all, do they differ from “rules” like these:

- Candidates for office should cater to the extremes in the primary, but to the center in the general election;
- Male candidates should wear a suit and tie at debates;
- When politicians step down from office, they almost invariably claim that the motivation is to spend more time with their families;
- Every year, the President pardons a turkey on Thanksgiving Day.

There is a myriad of conceptual puzzles about these examples, problems that bedevil philosophers and students of jurisprudence. From the practical lawyer’s standpoint, however, the problem is to disentangle three sorts of action:

(1) Action that is essentially contingent and circumstantial, a product of the specific situation at hand. In some circumstances, one political party will favor a certain foreign military intervention, or a certain domestic farm policy, but we would not be surprised if the parties were to flip their positions over time, as circumstances shift.

(2) Action that is regular, but does not rest on any sense of normative obligation. This sort of action may rest on rules of thumb rather than rules in any stronger sense. It is a very useful rule of thumb that a politician leaving office will do well to claim that the motive is to spend time with family, but there is no normative obligation attached to that, and there are cases

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<sup>10</sup> Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163 (2013).

<sup>11</sup> Joan Maisel Leiman, *The Rule of Four*, 57 COLUM. L. REV. 975 (1957).

in which it is advantageous for the politician to say something else, for instance that she is stepping down to protest violation of some high principle. Regular action without normative obligation may also reflect a pure ritual without the normative aura of tradition. The President's pardoning of a turkey on Thanksgiving falls in this category. No one (sensible) would be outraged if a President discontinued the practice.

(3) Action that is both regular and rests on a sense of normative obligation. The relevant sense of obligation may take different forms. In one form, political actors fear sanctions for breaching the convention. The sanctions need not be judicially-enforced sanctions like damages, fines or imprisonment; on the classical account of conventions, the relevant sanctions are strictly extra-judicial, and involve political opprobrium, retaliation or refusal to cooperate by the opposing political party, public backlash and ultimately electoral defeat at the hands of a disapproving public or pivotal fraction thereof. In another form, the obligation is genuinely internalized by political actors who believe that political morality requires them to act in accordance with the convention. Indeed, internalization may be so profound that it does not even occur to the actor that it is possible to violate the convention, in which case the convention has attained a kind of cognitive hegemony.

All these forms of obligation are extremely difficult for an outside observer to distinguish; in the extreme they will be observationally equivalent. A political actor who obeys a convention solely out of rationally self-interested fear of sanctions may well claim to be doing so out of deeply felt principles of political morality, especially if so claiming is costless. Yet there is no doubt that in some cases, political actors really do obey conventions out of deeply felt principles of political morality. Were that not so, then the mimicking of those sincere actors by insincere actors would be pointless and ineffective.

Having distinguished these three types of action, there is a semantic morass into which the discussion frequently stumbles: which of (1), (2) or (3) should we call "political"? In a deep sense, all of these are of course thoroughly political. In a shallow sense, however, it is perfectly good English to reserve "politics" for the circumstantial jousting of partisans (case (1)), for rules that do not rest on a sense of normative obligation (case (2)), or for both. I will do exactly that, while using "convention" to denote regularities of political behavior that are backed by a sense of obligation (case (3)).

To summarize, I will define conventions as (1) unwritten rules of political behavior that are (2) widely acknowledged and regularly followed from (3) a sense of obligation -- either (3A) a thin sense of obligation resting on a credible threat of sanctions or (3B) a thick sense of obligation resting on internalized precepts of political morality.<sup>12</sup> There are a half-dozen terms that loiter in the neighborhood of conventions -- practices, customs, norms, etiquette and so on -- and one might waste a lifetime diagramming the family relationships among these. But American lawyers tend to use “custom” and even “practice” to mean normatively freighted customs or practices, so those terms are rough synonyms for convention. I will blithely skirt the whole semantic morass and treat custom, practice and convention as interchangeable shorthand for the definition I have given, unless context clearly dictates otherwise.

This definition is intended to capture the mainstream view in the modern Commonwealth theory of conventions. Different writers invariably put things somewhat differently, but the common elements are, very broadly, a regular political behavior backed by a sense of obligation, or *opinio juris*. (International lawyers will see here the main elements of internal customary law, which I will later touch upon very briefly.) There is one strand in Commonwealth theory that goes further, however. In this strand, stemming from Sir Ivor Jennings, conventions must also rest on good reasons.<sup>13</sup> I believe that this strand is mistaken, and deeply so; it misunderstands what conventions are and what roles they play in a constitutional polity. Conventions always have a coordination component, in addition to whatever distributive component they may or may not have. Requiring that there be “a reason for the rule,” as the Jennings approach does, assumes away the problem of disagreement over good reasons that creates the need for rule-based coordination in the first place. It is because political actors do not fully agree about the reasons for rules that there have to be rules at all. I return to this issue later; suffice it to say here that the Jennings approach is not widely accepted.<sup>14</sup>

Finally, I will limit the discussion to extrajudicial conventions. The example of the Supreme Court’s Rule of Four for certiorari petitions, given earlier, illustrates conventions that arise and operate within the judicial system itself. There are many such conventions, but they are

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<sup>12</sup> For the details, see Vermeule *supra* note 10.

<sup>13</sup> W. IVOR JENNINGS, *THE LAW AND THE CONSTITUTION* 136 (5th ed. 1959).

<sup>14</sup> COLIN TURPIN & ADAM TOMKINS, *BRITISH GOVERNMENT AND THE CONSTITUTION: TEXT AND MATERIALS*, 161 (“[t]his approach [i.e. the Jennings approach] while in many respects commendable, is not authoritative.”) (6<sup>th</sup> ed. 2011).



not my concern here. The hardest and most consequential issue for public law is whether, and when, judges may incorporate into their decisions conventions that arise among extrajudicial political actors, such as executive and legislative officials, voters and political parties. All the conventions I will discuss in what follows arise extrajudicially in that sense.

### B. Conventions, Law and Judging: Major Positions

Armed with this background definition of conventions, the main issue I mean to address is whether, and to what extent, extrajudicial conventions should be enforceable in court by judges. This is not the same as the jurisprudential question whether conventions count as “law.” It is certainly possible to hold, for example, that conventions count as “law”, but that they should not be enforced by courts, or not all of them should be anyway. In an American setting, particularly, it is clear that there are rules of “law” that are obligatory on nonjudicial actors but are not enforced by courts, due to limitations of justiciability.<sup>15</sup> It is then an open question whether conventions fall into the set of such rules of law, but that question I need not and do not address as such. Conversely, one might deny that extrajudicial conventions count as law, but go on to say that (some) such conventions should be enforced by judges anyway; after all, on some leading jurisprudential approaches, judges are not limited to enforcing law, but may also enforce norms of political morality. I have no stake whatsoever in questions of that sort. Whether or not extrajudicial conventions count as law, the question remains whether and when federal courts in the United States should enforce them.

As to that question, I will examine three major approaches – the classical Diceyan view, the incorporationist view, and the modern Commonwealth view.

The classical Diceyan view. The classical approach in Commonwealth legal theory, stemming from the pre-eminent Victorian theorist Albert Venn Dicey, holds that conventions “are not enforced or enforceable by the Courts.”<sup>16</sup> Enacted written rules, including both statutes and administrative lawmaking and common law rules are all enforceable in court. (Dicey’s theory was keyed to a stipulative definition of “law,” according to which conventions did not count as “law” and were not enforceable in court for that reason. Again, however, I have no stake

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<sup>15</sup> Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097 (2013).

<sup>16</sup> Roger E. Michener, *Foreword* to A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION, 15 (ed. Roger E. Michener, Liberty Fund 1982), *available at* [http://files.libertyfund.org/files/1714/Dicey\\_0125\\_EBk\\_v7.0.pdf](http://files.libertyfund.org/files/1714/Dicey_0125_EBk_v7.0.pdf).

in that and the issue is entirely dispensable for my purposes). On this view, constitutional conventions are unwritten but obligatory political customs that are enforced directly by the threat of political sanctions -- principally public blaming and shaming, tit-for-tat retaliation by an opposing political party or electoral defeat. The striking consequence of the Diceyan view is that Commonwealth lawyers sometimes say that a given statute or government action would be “legal but unconstitutional” -- a seeming oxymoron to the American-trained lawyer.

A wrinkle is that Dicey sometimes said that breach of a convention would inevitably, sooner or later, require the offender to breach an enforceable legal rule and thus expose himself to legal sanctions.<sup>17</sup> But Dicey gave no convincing general reason to think that was so. There are straightforward examples in which it is not so, such as a breach of the convention of ministerial responsibility; and Dicey himself sometimes acknowledged that a convention might rest solely on nonlegal sanctions.<sup>18</sup>

The closest American analogue of the Diceyan view is a dissent by Justice Jackson in Ray v. Blair,<sup>19</sup> a neglected -- but theoretically crucial -- case that asked whether and how the originally intended constitutional independence of the Electoral College can be squared with the ironclad convention that presidential electors must vote for the nominee of their party. The Court, referring to the convention, upheld a state law requiring candidates in a Democratic party primary for nomination as an elector to pledge to vote on partisan grounds. Justice Jackson dissented vigorously, arguing that such a pledge was foreign to the constitutional text and its purposes, and that “[a] political practice which has its origin in custom must rely upon custom for its sanctions.”<sup>20</sup> Conventions, in other words, should be enforced solely by nonjudicial means.

The incorporationist view. Jackson’s Diceyan position in Ray v. Blair is something of an outlier. American law has long said that constitutional rules may be developed through “liquidation”<sup>21</sup> or “practical construction” through the interaction of the nonjudicial branches, and that judges may incorporate the resulting normatively freighted practices or customs into their decisions. On this view, conventions are straightforwardly incorporated into the law, and

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<sup>17</sup> *Id.* at 319.

<sup>18</sup> *Id.* at 443 n.15.

<sup>19</sup> 343 U.S. 214 (1952).

<sup>20</sup> *Id.* at 233 (Jackson, J., dissenting).

<sup>21</sup> Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519 (2003).

are straightforwardly judicially enforceable in whatever ways, and to the extent that, other sources of law are judicially enforceable. Cross-cutting limitations on enforceability -- standing, the political question doctrine, and so on -- might apply when relevant, but conventions would not be special in that regard.

The incorporationist view comes in two varieties, weak and strong. In the weak version, conventions may be incorporated into the constitutional law only when the constitutional text is general, vague or ambiguous, but may not be used to override clear and specific text.<sup>22</sup> Justice Jackson, shifting his ground, also suggested such a view in dissent in *Ray v. Blair*. “Usage,” he said, “may sometimes impart changed content to constitutional generalities, such as ‘due process of law,’ ‘equal protection,’ or ‘commerce among the states,’”<sup>23</sup> but not otherwise. As we will see, this weak version of the incorporationist view is compatible with the modern Commonwealth view of conventions, which I will outline and defend.

However, there is also a much stronger version of the incorporationist view – a version that, as we will see, cannot be squared with the modern Commonwealth approach. In this strong version of incorporationism, usage itself helps to define meaning. In some moods, the Court will say things like “in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself, even when the validity of the practice is the subject of investigation.”<sup>24</sup> Whereas the weak version is in effect a canon of constitutional and statutory interpretation that applies when constitutional or statutory provisions are otherwise vague, silent or ambiguous, the strong version holds that usage or practice is itself among the sources that judges should use to decide whether the relevant provision is silent or ambiguous in the first place. The strong view is highly consequential and theoretically significant. For one thing, it directly contradicts the putative distinction between “interpretation” and construction that some theorists of legal interpretation endorse. On that account, interpretation looks only to the semantic meaning of the provision, while construction looks to practices and usages on the part

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<sup>22</sup> This may be what Justice Frankfurter meant in the Steel Seizure cases, when he wrote that “[d]eeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (concurring opinion). As usual with Frankfurter, however, the fog of words makes it hard to be sure. For state cases standing for the general proposition that custom cannot override clear statutory meaning, see U.S. cases cited in DAVID J. BEDERMAN, *CUSTOM AS A SOURCE OF LAW* 105 (2010).

<sup>23</sup> *Ray*, 343 U.S. at 233 (Jackson, J., dissenting).

<sup>24</sup> *United States v. Midwest Oil Co.*, 236 U.S. 459, 473 (1915).

of interpreters.<sup>25</sup> The strong view, however, denies that there is any meaning apart from practice or usage.

The modern Commonwealth view. In recent decades, modern Commonwealth theorists have converged on an updated view that adapts and modifies Dicey to fit a more complicated world in which conventions constantly interact with statutes. Here, the key distinction is between judicial recognition of conventions, on the one hand, and on the other judicial enforcement of conventions as a freestanding source of legal claims.<sup>26</sup> The modern view holds that judicial recognition of conventions is permissible, indeed sometimes inescapable, but that judicial enforcement of conventions is impermissible.

A standard illustration in Commonwealth legal theory is a decision of the Canadian Supreme Court called the “Patriation Reference.”<sup>27</sup> The issues in the case were complex; the Court faced a battery of questions posed by the federal government and various provinces. Simplified, however, the main issue was whether the Parliament of Canada needed the consent of all, or at least a large supermajority, of Canadian provinces in order to request constitutional changes from the United Kingdom Parliament as to matters affecting relations between the Canadian federal government and the provincial governments.

The Justices of the Supreme Court decided three points, by two different majorities. One majority held that there was no legal restriction in constitutional law that would require provincial consent for such a request. A different majority held that (1) there was a constitutional convention requiring provincial consent; and, critically, that (2) the proper role of courts is to recognize but not enforce the convention.<sup>28</sup> At the aggregate level of the whole Court, the outcome was a sharp contrast between law and convention, combined with a willingness on the judges’ part to recognize conventions even while refusing to enforce them.

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<sup>25</sup> See, e.g., KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999); Lawrence B. Solum, *Incorporation and Originalist Theory*, 18 J. CONTEMP. LEGAL ISSUES 409 (2009).

<sup>26</sup> GEOFFREY MARSHALL, CONSTITUTIONAL CONVENTIONS: THE RULES AND FORMS OF POLITICAL ACCOUNTABILITY 15 (rev. paperback ed. 1986).

<sup>27</sup> See Reference re Resolution to Amend the Constitution, [1981] 1 S.C.R. 753, 807, 909 (Can.) (recognizing but refusing to enforce convention that Parliament will not propose any measure to amend Constitution of Canada that affects federal-provincial relations without agreement of provinces).

<sup>28</sup> *Id.* at 759-60.

Two issues involving the Securities and Exchange Commission (SEC) illustrate the distinction between recognition and enforcement in the U.S. setting. Free Enterprise Fund v. Public Companies Accounting Oversight Board examined the constitutionality of the Public Companies Accounting Oversight Board (PCAOB),<sup>29</sup> an independent body whose members could be discharged only for cause. The PCAOB was nestled within an agency, the SEC, which was also independent in the sense that its commissioners could be discharged only for cause – or so the parties stipulated. In permitting that stipulation, and assuming its validity for purposes of the decision, the Court indirectly recognized the existence of a convention making the SEC commissioners dischargeable only for cause.<sup>30</sup> That recognition was the necessary predicate for the Court’s holding, which was that the statutory scheme was unconstitutional because it created two nested levels of independence; it made the PCAOB independent of, and within, the independent SEC. Absent the unwritten convention that the SEC is independent of the President, only a single layer of insulation would have been present.

The convention of SEC independence explains why the SEC appears on every list of “independent” agencies. Yet the relevant statute actually gives the Commissioners no tenure protection whatsoever, and the Court has been clear that the default rule for interpreting agency organic statutes requires Congress to speak expressly to give officials for-cause tenure (unless the officials exercise solely adjudicative functions, unlike the SEC).<sup>31</sup> Despite the convention, imagine that the President discharged an SEC Commissioner without offering cause, and a suit for back pay were brought in an attempt to enforce the convention directly – the standard procedural posture in cases on the constitutionality of independent agencies.<sup>32</sup> Would the Court treat the SEC as an independent agency?

Given the precedents on executive tenure, the Court would almost certainly deny the claim. There is a clear and consistent line of precedents, both judicial precedents from the Court and opinions from the office of Legal Counsel, stating that at-will tenure is the default norm for federal officers, so that Congress must speak clearly to confer for-cause tenure. The only exception that the Court has recognized – the only case in which the Court has implied for-cause

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<sup>29</sup> *Free Enter. Fund v. PCAOB*, 130 S. Ct. 3138 (2010).

<sup>30</sup> See Vermeule, *supra* note 10 for further discussion.

<sup>31</sup> President’s Authority to Remove the Chairman of the Consumer Product Safety Commission (CPSC), 2001 WL 34089651 (O.L.C. July 31, 2001); *Parsons v. United States*, 167 U.S. 324 (1897); *Shurtleff v. United States*, 189 U.S. 311 (1903).

<sup>32</sup> See, e.g., *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935).

tenure – involved an agency deliberately modeled on the Article III judiciary, an agency that exercised strictly adjudicative functions.<sup>33</sup> There are a couple of older lower-court cases that read implied for-cause tenure into the organic statutes of agencies with nonadjudicatory functions,<sup>34</sup> but those decisions were confessedly dicta,<sup>35</sup> and are of dubious authority today. The upshot is that the Roberts Court – the same Court that allowed the parties to stipulate to SEC independence as a collateral issue in PCAOB – is most unlikely to enforce the convention in its own right. SEC independence may be recognized, but will not be enforced.

Likewise, even though there is a powerful convention that the chair of the Federal Reserve qua chair is independent of the executive, there is no statutory basis whatsoever for affording the chair any form of legal tenure qua chair.<sup>36</sup> As a consequence, I believe that were the President to fire a Fed chair mid-term, the Court would leave the convention to rely upon political enforcement for its sanctions, a la Jackson, and would refuse to rule the discharge illegal. The convention here is so powerful, however, that the thought experiment is probably fated never to be realized. As is ordinarily the case with conventions, the more forceful they are, the less likely they are to be violated, so the less likely there is to be a legal case arising out of their violation, and the harder it is to be sure what courts would do.

Similarities and differences. The distinction between recognition and enforcement is intended to bar judicial enforcement of conventions as freestanding claims, meaning claims that might operate in court apart from, or even inconsistently with, enacted law or common law. But what is the cash value of identifying this modern Commonwealth view? What, if anything, is the difference between (1) the modern Commonwealth view and the Diceyan view; (2) the modern Commonwealth view and the incorporationist view – in either its weak or strong version?

In the classical Diceyan view, conventions are ignored altogether. The existence and content of conventions are treated as “political” or “nonlegal” questions, and it is assumed that courts may only enforce or even recognize legal claims. In the Patriation Reference, it had been argued – and some lower-court judges had concluded – that the courts could not even recognize the relevant convention of federal-provincial relations, on the grounds that the whole subject

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<sup>33</sup> *Wiener v. United States*, 357 U.S. 349 (1958).

<sup>34</sup> *Swan v. Clinton*, 100 F.3d 973 (D.C. Cir. 1996), *FEC v. NRA Political Victory Fund*, 6 F.3d 821 (D.C. Cir. 1993).

<sup>35</sup> *Swan*, 100 F.3d at 981-83; *FEC*, 6 F.3d at 826.

<sup>36</sup> Here too, the details are in Vermeule, *supra* note 10.

presented a strictly “political” question.<sup>37</sup> The Canadian Supreme Court rejected this claim, holding that the statutes defining the Court’s jurisdiction allowed it to discuss conventions, even when not enforcing them.<sup>38</sup> This position exemplifies the modern Commonwealth view; it relaxes the classical Diceyan distinction between law and politics partway, but only partway. It allows courts to recognize conventions for certain purposes and in certain ways, but not to enforce them as freestanding obligations.

The trickier question is the relationship between the modern Commonwealth view and the incorporationist view. It is clear that the strong version of incorporationism is inconsistent with the modern Commonwealth view. To make a convention constitutive of the very meaning of a constitutional or statutory text is, in effect if not in name, to give it independent constitutional or statutory force in its own right. At a minimum, then, there is that important difference between the modern Commonwealth view and one version of the incorporationist position.

The harder issue, though, is whether the Commonwealth view is inconsistent with the soft version of incorporationism, in which conventions may be used only to fill in gaps or ambiguities in constitutional or statutory text. Is this a form of recognition or a form of enforcement? I believe it is not enforcement in the sense condemned by the Commonwealth view. The nub of the Commonwealth view is that conventions are not to be enforced by courts as freestanding obligations.<sup>39</sup> When conventions are used as context for the interpretation of enacted texts, however, that injunction is not violated. Rather, the convention’s force is entirely ancillary to, and derivative of, the force of the written text. I will return to this issue shortly.

### C. Puzzles about Recognition and Enforcement

The distinction between judicial recognition of conventions and judicial enforcement of conventions is the sort of distinction that pervades law: clear enough at the extremes, fuzzy at the boundary. I do not at all claim that the distinction is self-applying, or that all cases under the distinction will be easy ones. The only question is whether, as a practical matter, the distinction

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<sup>37</sup> Reference re Resolution to Amend the Constitution, at 774.

<sup>38</sup> *Id.* at 847-48.

<sup>39</sup> Thus arguments for direct enforcement of conventions by judges, *see, e.g.*, Mark Elliott, *Parliamentary Sovereignty and the New Constitutional Order: Legislative Freedom, Political Reality, and Convention*, 22 *LEGAL STUD.* 340 (2002), go beyond the current consensus. They are best understood as bids to forge a new consensus that may succeed in the future.

manages to do a rough but tolerable job of sorting out undesirable from desirable judicial behaviors.

All that said, we can make some progress on clarifying the distinction by proceeding on two fronts. First, I will compare and contrast the distinction to three other distinctions in the neighborhood: direct vs. indirect use of conventions; law vs. fact; and injunction vs. damages. Second, I will elaborate on the point and purpose of the distinction.

Other distinctions. The nub of the distinction between recognition and enforcement is that courts will not enforce conventions as freestanding claims. Is that the same as, or different than, a distinction between giving conventions indirect effect and direct effect? There is another semantic tangle here, but one that ultimately does not affect the substance of the issues.

The semantic tangle is that the use of conventions as interpretive context might be described, and sometimes is described by Commonwealth theorists, as “indirect” enforcement as opposed to “direct” enforcement.<sup>40</sup> If those terms are used, then the Commonwealth approach would hold that indirect enforcement is permissible, whereas direct enforcement – enforcement as a freestanding obligation, not ancillary to the interpretation of an enacted written text – is not. For purposes of my discussion here, nothing of substance turns on which description is chosen. It does not matter, for any of the examples I shall discuss, whether we understand the Commonwealth view as drawing a line between recognition and enforcement, or instead as drawing a line between indirect and direct enforcement. In either case, the forbidden move, the thing that lies beyond the pale, is the same; conventions are not to be treated as freestanding obligations that are judicially enforceable in their own right.

In Free Enterprise Fund, as discussed earlier, the Court used the convention of SEC independence as crucial context for interpreting the relevant statutes. The hypothetical case arising out of that decision involved an SEC Commissioner, discharged without cause, who attempts to bring a suit to block the discharge, invoking the unwritten convention of SEC independence. That attempt might be described in two ways: either as an attempt to enforce the convention, in contrast to the Court’s recognition of the convention, or instead as an attempt to enforce the convention “directly,” in contrast to the Court’s “indirect” enforcement-through-interpretation in Free Enterprise Fund. But in either case, the hypothetical Commissioner’s claim

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<sup>40</sup> See, e.g., N.W. BARBER, THE CONSTITUTIONAL STATE 90 (2010).



is the paradigmatic case that the distinction between recognition and enforcement is meant to exclude. In what follows I will ignore this semantic issue, and use the language of recognition and enforcement throughout.

A second relevant distinction is between law and fact, and that distinction presents a more complex problem. The complexity arises because there is no simple answer to the question whether conventions should be understood as “law” or “fact.” It all depends on the purposes for which the question is asked, and by whom the question is asked. From the standpoint of extrajudicial actors, conventions have the same obligatory character as do constitutional or statutory texts or common-law rules, and that sense of obligation may rest on either the fear of sanctions or internalized respect for the relevant rules, just as in the case of judicially-enforceable law. In that sense, it is perfectly sensible to say that conventions count as law, a form of law that applies outside of courts,<sup>41</sup> although for my purposes I have no need either to confirm or deny that thesis. From the standpoint of judges, however, the existence and content of an extrajudicial convention are issues to which there is an answer, independent of what judges think. In that sense, “the law will treat the existence of a convention as simply a question of fact—though not a simple question of fact—since the conclusion may need to be established by a complex process involving both argument and historical exegesis.”<sup>42</sup> Thus conventions may be seen as either law-like or fact-like, depending upon one’s institutional role, perspective and purposes.

Finally, the distinction between injunctive relief and damages is entirely unrelated to the distinction between recognition and enforcement of conventions. As I will mention shortly, recognition of a convention is more akin to a declaratory judgment than to either of the coercive forms of relief. Were conventions to be enforced by judicially-administered sanctions, a further question would arise about what sort of sanctions ought to be applied, but that is not the view I suggest in any event.

Why recognition but not enforcement? The more fundamental question is why courts should make such a distinction in the first place. The distinction serves two positive purposes. The first purpose is to harmonize conventions with the enacted law, and vice-versa. Even if one

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<sup>41</sup> Bradley and Morrison, *supra* note 15.

<sup>42</sup> MARSHALL, *supra* note 26, at 17.

believes that enacted law is necessarily superior to convention, still it is impossible for judges to sensibly navigate the landscape of public law without awareness and recognition of conventions. Thus Nicholas Barber argues, with respect to the United Kingdom setting, that recognition of conventions is indispensable to the interpretation of statutes:

[j]udges can use conventions as an interpretative aid to clarify the meaning of statutes. Sometimes statutes make reference to conventions, and interpretation of the statute requires an interpretation of the convention. Sometimes statutes are passed in the context of conventions; the structure of the statute presupposes the parallel operation of these rules. A court which ignored conventions in this context would risk producing an impractical interpretation of the statute.<sup>43</sup>

In an American setting, Barber's point may be applied to both statutory and constitutional interpretation. Interpretation that ignores conventions entirely, as in the strictly classical Diceyan view, would blunder about in the dark, bumping into the realities of official behavior outside the courts. In Ray v. Blair<sup>44</sup>, for example, what would it mean to ignore altogether the convention – then more than a century old – that requires partisan political voting in the Electoral College? A court that attempted such a degree of self-blinding could not even understand what the parties were disagreeing about, let alone issue an intelligent judgment in response.

A second purpose or function of judicial recognition of conventions is to provide focal points for cooperation by political actors. As we have seen, a number of conventions are plausibly supported by some form of give-and-take, tit-for-tat cooperation by ongoing political actors, such as two major political parties. That intuitive idea may in turn be cashed out in different ways.<sup>45</sup> We might imagine the parties as having Prisoners' Dilemma preferences: in a single-shot version of the game, each party has a dominant strategy to defect, because each would receive the highest payoff by defecting no matter whether the other defects or cooperates. Yet the parties will cooperate – very roughly speaking -- if the game is indefinitely repeated, if the long-run payoffs of cooperation exceed the short-run gains from defection (which implies that the parties do not discount the future too heavily), and if what counts as a cooperative move

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<sup>43</sup> BARBER, *supra* note 40 (footnote omitted).

<sup>44</sup> 343 U.S. 214 (1952).

<sup>45</sup> For an overview of the game-forms discussed here, see JAMES D. MORROW, *GAME THEORY FOR POLITICAL SCIENTISTS* (1994).

is clearly specified and common knowledge to both. Alternatively, the parties' first choice may actually be to cooperate, conditional on cooperation by the other, but each fears being made a chump. This is the so-called Assurance Game, or Stag Hunt, in which it can be rational to cooperate even in a single-shot game. In yet another interpretation, the relevant game-form is a Battle of the Sexes, a mix of cooperation and competition: each party prefers to act jointly with the other, yet the parties have different preferences over which joint action to take.

These models may be cashed out in a number of ways and given a number of further specifications. In most such specifications, however, a condition for long-run cooperation to occur is the existence of a focal point. It must be common knowledge – the parties know, know that the other knows, and so on – that a certain type of act counts as cooperation rather than defection. In our setting, conventions must be sufficiently well-defined that parties know whether the other is cooperating or not.

This is where judicial recognition enters the picture. The role of recognition is to clarify the terms of cooperation, and the existence of cooperation, through the public judgment of an impartial tribunal – a judgment that is observable and thus common knowledge to the parties. As Geoffrey Marshall puts it,

a court decision may decisively change the situation since politicians' doubts about what ought to be done may stem not from uncertainty about whether duty-imposing conventions are morally binding but from disagreement as to whether a particular convention does or does not exist. . . . The decision of a court may be accepted as decisively settling a political argument about the existence of a conventional rule.<sup>46</sup>

This focal-point effect of judicial recognition is not the same as binding legal enforcement. The judicial decision does not impose legal sanctions for violation of a convention, but instead leaves the sanction to be imposed extra-judicially, in whatever manner and by whatever processes sanctions would otherwise be imposed for violations of the convention – retaliation, political opprobrium, and so forth. The judicial decision does create an essential precondition for the

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<sup>46</sup> MARSHALL, *supra* note 26 at 15. It has been suggested that the Patriation Reference is an example, because the Court's recognition (albeit not enforcement) of the relevant federalism conventions made possible a subsequent agreement by political actors that yielded the Constitution Act, 1982. See TURPIN & TOMKINS, *supra* note 14, citing Richard Kay, *Courts as Constitution-Makers in Canada and the United States*, 4 SUP. CT. L. REV. 23, 33 (1982).

extra-judicial sanctions to occur – that the violation be common knowledge among the actors – but does not convert those sanctions into judicial commands.

A constitutional objection. In the setting of federal courts in the United States, it is plausible to worry that recognition, so defined, violates constitutional restrictions on judicial decisionmaking derived from Article III. If judges recognize conventions but do not enforce them, are they issuing pointless judgments that lack legally binding force? If so, then perhaps recognition of conventions amounts to nothing more than a constitutionally forbidden “advisory opinion.”<sup>47</sup>

I believe this claim, though not at all silly, is ultimately unpersuasive. There are two possible answers. One is to analogize judicial recognition of conventions to a declaratory judgment. Critics of the declaratory judgment mechanism used to say that it amounted to nothing but talk; after all, it affords neither damages nor binding injunctive relief.<sup>48</sup> The U.S. Supreme Court eventually rejected such claims,<sup>49</sup> holding that the function of the declaratory judgment – dispelling uncertainty, clarifying the rights and obligations of the parties and thereby allowing or encouraging settlement or voluntary compliance – was not at all nugatory or pointless.<sup>50</sup> The same may be said about judicial recognition of conventions. In the focal-point function I have outlined, in which recognition clarifies the existence of conventions and the parties’ compliance, or noncompliance, with conventions, the effect of recognition is much like that of a declaratory judgment. In the first function I outlined, in which courts draw upon conventions as context for statutory interpretation, the convention is even more obviously a consequential judgment rather than a strictly advisory opinion.

This first answer fits poorly with the modern Commonwealth theory, however. That theory rejects the analogy between declaratory judgments and judicial recognition of conventions; the English judges quashed the idea in a famous case,<sup>51</sup> although the U.S. conception of a declaratory judgment is extremely broad and may cover more territory than declaratory judgments do elsewhere. Whatever the status of this first answer, however, there is a

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<sup>47</sup> Letter from the Justices of the Supreme Court to George Washington (Aug. 8, 1793), in 6 DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 743-58 (Maeva Marcus et al. eds., 1998).

<sup>48</sup> See, e.g., Note, 45 HARV. L. REV. 1089 (1932).

<sup>49</sup> *Nashville, Chattanooga & St. Louis Ry. v. Wallace*, 288 U.S. 249 (1933).

<sup>50</sup> *Id.* at 259-64.

<sup>51</sup> *R v. Sec’y of State for Foreign and Commonwealth Affairs, ex parte Southall*, [2003] 3 C.M.L.R. 562 (C.A. 2003).

second, narrower answer which seems fully sufficient: judges recognize conventions only in the course of deciding other legal questions that represent full-blooded legal controversies. When judges recognize conventions as background and context for interpreting statutes, for example, the recognition is an ancillary byproduct of the decision of ordinary legal questions, as to which an ordinary binding judgment is issued. In the U.S. framework, then, the case as a whole amounts to a straightforward Article III “case or controversy” and there is no advisory-opinion problem about the judicial recognition of conventions.

### II. Assessing the Regimes

So much for the background and statement of the problems I will address. Which of these views about the relationship of conventions to judicial decisionmaking has the most to recommend it, and under what conditions? I will suggest that the Commonwealth view is the least of the evils. But my route to that conclusion will be indirect. First, I will clear some ground by discussing some considerations that are often thought to be helpful for thinking about the problem of conventions in court, yet that turn out to be misleading or erroneous (in II.A.). Second, I will explain why the incorporationist view and the classical view are untenable or unattractive. The classical view is untenable in the administrative state, where statutes and conventions collide too frequently to allow courts to ignore conventions altogether (II.B). The incorporationist view, on the other hand, is suspect on democratic grounds (II.C.), because of the inherent lack of democratic responsiveness and accountability in the generation of conventions. The consequence is that the modern Commonwealth view is the last man standing, the least bad of the alternatives.

Although I mean to offer an argument in support of a particular view, I also hope that the utility of the analysis does not stand or fall with the success of that argument. I also mean to offer a conceptual framework for thinking about the problem of conventions in court, in the hope that the framework is useful and illuminating even for those who are not ultimately persuaded by the argument I offer. Thus the hope is to offer, in a sense, analysis in the guise of advocacy.

#### A. Erroneous Considerations

Let me begin by clearing some ground. Discussions of conventions in court are often bedeviled by premises or assumptions that turn out to be quite misleading, or even downright erroneous. The general theme here is false comparison. The analyst implicitly compares

conventions that are indeterminate or otherwise imperfect with legal rules that are (assumed to be) perfectly determinate and well formed. Yet like should be compared with like, and on a number of dimensions, there is no general reason to think that conventions differ systematically from legal rules. Here are some examples.

The first will o' the wisp, which lures many astray, is the tempting thought that conventions are systematically more vague, less well defined, than written legal rules. But this is an erroneous generalization, usually stemming from an implicit comparison between a precise, pellucid text on the one hand and a spongy convention on the other. There are indeed plenty of examples like that, but the constitutional landscape is also full of precise, pellucid conventions and constitutional texts that are notoriously spongy or indeterminate. Justice Jackson's list of constitutional inkblots -- "due process," "equal protection" and so forth -- might be compared with the putative Hastert Rule, a convention much invoked within the House of Representatives in recent years.<sup>52</sup> The rule holds that legislation should not pass the House unless it has the support of a majority of the majority party --- thus excluding winning coalitions between the minority party and a dissenting rump of the majority. In recent years the Hastert Rule has been more honored in the breach than in the observance, and may now be a dead convention,<sup>53</sup> but the political scientists can confidently count the breaches precisely because the Hastert Rule is so well defined.

In other cases, conventions have a well-defined core but fuzzy edges. The two-term convention for the presidency had a fair amount of open texture, as illustrated by the case of Theodore Roosevelt's bid in 1912. Roosevelt's first term (1901 to 1904, after the assassination of President McKinley) was partial and obtained by succession to the office rather than by election, and his third term would have been nonconsecutive with the first two. Did the two-term convention apply? The case was a hard one. Yet the two-term convention had a perfectly intelligible core, which actually operated as advertised in important cases.<sup>54</sup> And plenty of written constitutional rules display open texture and fuzzy peripheries, as every volume of the U.S. Reports testifies. There is just no general reason to think that conventions and written rules

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<sup>52</sup> See Barber *supra* note 9.

<sup>53</sup> Burgess Everett et. al., *Boehner Taps Dems to Push Budget Deal Across Finish Line*, POLITICO (Oct. 17, 2013, 10:05 AM), <http://www.politico.com/story/2013/10/government-shutdown-debt-ceiling-default-update-98390.html?hp=t1>.

<sup>54</sup> H.W. HORWILL, *THE USAGES OF THE AMERICAN CONSTITUTION* (1925).

differ systematically in this regard, although for some reason the contrary intuition is difficult to dislodge.

Nor is there any reason to think that conventions are systematically more or less costly for judges to identify and interpret than are written legal rules. Indeed, from the standpoint of judicial competence – the analysis of judicial decision costs and error costs -- conventions may be an unusually easy source for judges to handle. Conventions, as usually defined and as I have defined them, are supposed to be widespread and generally acknowledged. The consequence is that serious good-faith disagreement over the existence of a convention implies that there is no convention.<sup>55</sup> (Parties in court might strategically claim that there is serious disagreement, but judges can ask for evidence that the disagreement occurred outside of court and predates the litigation.) The nature of conventions reduces uncertainty about their existence; and for the reasons given earlier, uncertainty about their scope and boundaries does not seem systematically more serious than for written legal rules.

### B. The Administrative State and the Diceyan Regime

If the foregoing considerations are not the right ones to focus on, we need to know what are the relevant considerations; we need to rethink the issues from the ground up. Analytically, the problem is one of collective decisionmaking for judges, where the decision involves the set of possible rule-regimes for the treatment of conventions in future cases. As with all decision problems, the first step is to identify the feasible set – the set of rule-regimes which are practically available, as opposed to conceptually or logically available. If we proceed in this fashion, it becomes clear, I believe, that the classical Diceyan view – whatever its intrinsic conceptual merits or demerits – is simply not within the feasible set of rule-regimes for judges in the modern administrative state.

Dicey struggled throughout his career – which spanned the end of the 19<sup>th</sup> century and the beginning of the 20<sup>th</sup> – to come to terms with the burgeoning administrative state. The problem was the radical expansion of the number and density of statutory rules, including administrative regulations under statutory authority -- what the British call “delegated legislation” and Americans call “rulemaking.” Dicey’s view of conventions was initially formulated in and for a

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<sup>55</sup> This is a narrower version of an argument in Jon Elster, *Unwritten Constitutional Norms* (Feb. 24, 2010) (unpublished manuscript) (cited with author’s permission), available at <http://www.ucl.ac.uk/laws/jurisprudence/docs/2010/Elster24Feb2010.pdf>.

largely common-law world, with statutes limited to episodic remediation of flaws in the common-law order, and generally relegated to the background. The classical view that judges should ignore conventions turns out to be untenable when, and because, the administrative state crowds the legal landscape with statutes and regulations.

The problem is not that there are more conventions; indeed, it is possible, although not clearly true, that statutes and conventions are in some large-scale way substitute instruments of regulation, so that the more statutes there are, the more conventions are crowded out by statutes. The more definite and unavoidable problem is that the more statutes and regulations there are, the more statutes and regulations will assume knowledge of extant conventions, will implicitly cross-refer to conventions, or will otherwise interact with conventions. As the administrative state expands, judges face more and more cases in which it is simply impossible to make an intelligent decision, or to write an intelligible opinion, without in some way taking account of conventions.

In Free Enterprise Fund, for example, it is unclear how a judge could even write a coherent opinion, let alone a persuasive one, without explicitly or implicitly recognizing the convention of SEC independence. That convention pervasively shaped the significance of the dispute, the background expectations of the parties and lower courts and the consequences of ruling one way or another. It is possible, perhaps even just, to criticize the Court for using the device of a stipulation to say as little as possible about the convention, leaving its recognition entirely implicit – in contrast to the straightforward candor of the Supreme Court of Canada in the Patriation Reference. But it is not thinkable that the Court should have attempted to have nothing to do with the convention altogether. In Free Enterprise Fund, a classical Diceyan approach is essentially unthinkable. From the standpoint of judges and other constitutional actors, conventions are like the weather: ubiquitous and irresistible. Extant conventions will inevitably constrain and shape written lawmaking and judicial interpretation of written laws. The insight of modern Commonwealth theorists is that conventions are inescapable context for the interpretation of written laws -- both statutory and regulatory rules and, in the American case, written constitutional rules.



C. The Democratic Deficit of Conventions

Despite the ubiquity of conventions, judges need not directly enforce them. Although the crowded landscape of the administrative state requires that judges recognize conventions so as to be able to steer around them, nothing requires that they provide judicial sanctions in addition to the extra-judicial sanctions that underpin conventions. As to direct enforcement, judges have a real choice in the matter, and I will argue that the choice should be negative. The principal argument will be rooted in democratic theory: conventions are democratically suspect, and direct judicial enforcement would exacerbate the democratic deficit that afflicts conventions.

I will begin by sketching an analytic framework intended to bring out the relevant considerations. Classically, as in the Diceyan view, conventions are both generated and enforced in a decentralized fashion. Conventions “are unlike legal rules because they are not the product of a legislative or of a judicial process.”<sup>56</sup> Rather, they emerge from decentralized interactions among officials, political parties and the public; they are sustained, in equilibrium, by a decentralized threat of sanctions or by the individual conscience.

In the regimes we are comparing, conventions might be treated in any of three ways:

Regime (1): Conventions are generated and enforced in decentralized fashion -- the Diceyan regime;

Regime (2): Conventions are generated in a decentralized fashion but enforced by a centralized hierarchical judiciary, like the U.S. federal judiciary -- the incorporationist regime;

Regime (3): Conventions are generated in a decentralized fashion and recognized, but not enforced, by the judiciary -- the modern Commonwealth regime.

The structure of my argument will be that, from a democratic standpoint, the regimes should be ranked in the following order: (1)>(3)>(2). Regime (3), the incorporationist regime in which conventions are generated in a decentralized fashion but enforced by a centralized judiciary, is worst of all. Regime (1), the Diceyan regime, is best from a democratic point of view, but I have already argued, in II.B., that it is not a feasible regime for courts in the administrative state. Thus regime (3), the modern Commonwealth regime, is the top ranked of the feasible choices and should be preferred.

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<sup>56</sup> MARSHALL, *supra* note 26, at 216.

The democratic deficit. The decentralization of constitutional norm-generation is what makes conventions democratically suspect. There is no well-defined office, official or institution who chooses among possible constitutional conventions and promulgates them. Suppose there is a convention that is obsolete, oppressive or unjust. There is no public body, no office, no well-defined institutional point of access, to which one might go in order to ask for a change in the convention. Rather there is just the whole political system, with conventions arising as an overall equilibrium of the system. If the equilibrium is bad, according to some normative theory of constitutional and political morality, what can one do? The answer is deeply unclear.

Conventions are equilibria, and equilibria may be bad. At a minimum, some citizens may have reasonable claims or arguments that the equilibrium is bad, and may seek to persuade others to think likewise. If that situation obtains, democracy requires that there be, at least in principle, some well-defined institutional mechanism by which citizens might put their claims before the polity, with at least a theoretical chance of persuading fellow citizens to change the rules accordingly. Where such a mechanism is lacking, the panoply of democratic values -- clear accountability for lawmaking, responsiveness to citizens, deliberation in common and formalized participation in self-government -- are all compromised. For pedagogical reasons, theorists of convention always begin with the simple limiting case of pure coordination equilibria, in which all that matters is that some choice or other be made; in such cases conventions are at their most valuable and the democratic objection is at its weakest. But such cases are also rare in the real world (driving, by the way, is not a clear example). Almost all conventions mix coordination with distributive consequences, as in the Battle of the Sexes, and such consequences ought to be subject to democratic oversight.

Sometimes a quasi-Hayekian defense of conventions is offered: conventions represent a form of spontaneous political ordering, and spontaneous ordering has valuable properties. Conventions draw upon the “wisdom of crowds,”<sup>57</sup> resulting in epistemically superior norms. In a variant, the defense is quasi-Burkean: conventions represent political customs sanctified by tradition, and tradition impounds collective wisdom; it is the epistemic “bank and capital of nations, and of ages.”<sup>58</sup> Sometimes, the quasi-Hayekian or quasi-Burkean defenses are even cast

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<sup>57</sup> JAMES SUROWIECKI, *THE WISDOM OF CROWDS* (2004).

<sup>58</sup> EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* 183 (W. Alison Phillips and Catherine Beatrice Phillips eds., 1912) (1790).

in democratic terms. The outputs of representative institutions at any given time may be an aberration; the enduring customs and traditions of the collective polity, extended over generations, possess superior democratic credentials.

Unfortunately, claims of this sort are at best overblown, as I have argued at length elsewhere. There is no general or systematic invisible-hand mechanism that makes decentralized norm-generation appealing from the standpoint of either welfarist or nonwelfarist political morality.<sup>59</sup> The wisdom-of-crowds mechanisms are too specialized, and too fragile, to support any such claims; tradition is as likely to embody conformism, cascade effects and arbitrary power as it is to impound collective wisdom or enduring democratic values.<sup>60</sup> Conventions are equilibria, meaning merely that a unilateral departure from the convention will be sanctioned. But there is no providential principle that bars normatively abhorrent equilibria from arising. At a minimum, conventions may represent normatively contestable choices among the relevant options; is anyone confident that the two-term convention for the presidency was clearly superior to the competing institutional possibilities, or that the Hastert Rule is a great idea?

The upshot is that conventions have systematically suspect democratic credentials and no systematic virtues to recommend them, outside of the rare cases of pure coordination equilibria. The ledger shows a democratic deficit, all told. There are several arguments that would undermine this conclusion, but they are partly or wholly mistaken.

Common law and statutory override. Perhaps the argument proves too much, because it applies with equal force to the common law. A great deal of common law incorporates sub-constitutional conventions, such as industry custom, or general social conventions that determine reasonable care. Are those democratically suspect as well? Well, perhaps they are; the debates are very old.<sup>61</sup> But bracketing that larger issue, the democratic status of the sub-constitutional conventions incorporated into the ordinary common law is a question whose stakes are much lower than is the analogous question for conventions of the constitution. The stakes are lower because statutes may override common-law rules in a straightforward way. There is a

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<sup>59</sup> ADRIAN VERMEULE, *THE SYSTEM OF THE CONSTITUTION* (2011).

<sup>60</sup> ADRIAN VERMEULE, *LAW AND THE LIMITS OF REASON* (2009).

<sup>61</sup> On the complex issues – jurisprudential and otherwise – that arise from the interaction among legislation, common law, custom, and democratic theory, see Jeremy Waldron, *Custom Redeemed by Statute*, in *CURRENT LEGAL PROBLEMS 1998: LEGAL THEORY AT THE END OF THE MILLENNIUM* (M.D.A. Freeman ed.) 93-114. “Custom” and “convention” need not be the same idea, of course; the latter entails a sense of obligation that may or may not be present in the former. See *id.* at 101-103.

hierarchically superior process, the ordinary legislative process, to which citizens may in principle appeal, and this limits the damage from whatever democratic deficit may arise when democratically suspect conventions are incorporated into the common law.

Constitutional conventions and statutory override. Now, to be sure, in a classical Westminster-style regime of full Parliamentary sovereignty, statutes may also trump even conventions with constitutional force – hence the location of the Commonwealth lawyers that a statute may be “legal but unconstitutional.” The legislative process does satisfy the democratic criteria I have laid out; there is, in principle, a well-defined institution to which citizens may go that has the power, by formalized action, to change statutes. So if and to the extent that statutes may override conventions of the constitution, then here too there is a well-defined and democratically appropriate procedure to which citizens may appeal. On this response, the same procedure that stands ready to cure the democratic deficits of conventions incorporated into the common law (whatever they may be) stands ready to cure the democratic deficits of constitutional conventions.

This point is inadequate as to conventions of the constitution, even if it is adequate as to sub-constitutional conventions incorporated into the common law (as I suggested just now). The problem in the constitutional setting is precisely that the statute must violate the constitutional convention, must be unconstitutional, in order to trump the convention. If a convention is violated by statute there is, by definition, a gauntlet of political sanctions that the relevant enactment must run, and that it would not have to run if there were no such convention. That gauntlet is an extra cost, as it were, imposed on ordinary legislative processes by constitutional conventions whose genesis is democratically suspect. Legislation that overrides the common law need run no gauntlet at all; there is no extra cost, no extra political sanction, imposed on democratic recourse to the legislative process in that setting. As to conventions of the constitution, then, it remains the case that there is no well-defined democratic institution or procedure to which citizens may turn in order to simply remove the convention, without having to violate it first. Rather the only way to remove it is by first violating it, if the politics will allow, and that is precisely what is democratically objectionable.

Conventions based on good reasons. Another answer tries to define away the problem by baking normative content into conventions themselves. I have mentioned the theory of

conventions offered by Sir Ivor Jennings, according to which conventions require not only regular behavior backed by normative obligation, but also good reasons. Perhaps that theory solves the problem of bad equilibria, almost by stipulation. If the convention is bad, it is not a convention anyway.

In my view, this claim merely highlights the problem with the Jennings account, which is that it has no theory of disagreement. Citizens may reasonably but irreducibly disagree over whether a convention is based on good reasons. What is the authoritative institutional procedure for deciding which view will prevail? There is none. The genesis of a new convention, or the change of an old one, must bubble up through some mysteriously decentralized process, rather than being settled by an authoritative decision-procedure that is sufficiently transparent, accountable and responsive. More precisely, then, the Jennings account has no theory of collective and cooperative action among citizens in the face of irreducible disagreement over what counts as a good reason for a convention – no theory of democracy. It tacitly assumes some sort of consensus, probably an elite consensus, about what counts as a good reason. That assumption exacerbates, rather than ameliorates, the democratic deficit.

Comparative institutionalism. One ought to compare the democratic deficit of conventions to that of other norm-generating processes and institutions, such as legislatures. It might seem implausible that conventions are systematically more suspect, from a democratic point of view, than, say, the legislative output of the U.S. Congress – an institution whose democratic deficits and dysfunctions are the stuff of legend. On at least one critical margin, however, I believe that conventions are indeed more suspect. When federal statutes are enacted, however severe the background deficits of the Congress, it is usually clear who the pivotal voter or coalition of voters will be.

When the Patient Protection and Affordable Care Act was progressing through the Congress, the identity of pivotal voters was a matter of common knowledge, even to ordinary voters. In the Senate, when Scott Brown campaigned successfully for Ted Kennedy's seat in Massachusetts, he signed autographs as "Scott 41" -- because if elected, he would supply the pivotal 41<sup>st</sup> vote to filibuster the bill in the Senate. In the House, the final act of the drama -- already shaped by Brown's pivotal filibuster vote -- turned on the politics of a pivotal coalition of pro-life Democrats led by Representative Bart Stupak. By contrast, it is seldom clear whom the

public may blame or praise for the genesis of conventions. Who was the “pivotal voter” or pivotal actor who instituted partisan voting in the Electoral College? The very question seems ill conceived. Rather, the convention bubbled up out of a whirlpool of political and social interactions, as is usually the case. No doubt some conventions are deliberately created by identifiable actors who may be held politically accountable; I have already mentioned the Hastert Rule. The difference is that there is a large and important class of conventions that have simply emerged into existence, without having been fashioned by anyone in particular.

Judicial democracy? One might say that the judges who identify and enforce the conventions are themselves selected and appointed by representative institutions and will, with some time-lag, ultimately follow the election returns, if only by virtue of death-with-replacement. This argument proves too much; it implies that anything politically appointed judges decide to do has good and sufficient democratic credentials. It is surely meaningful and coherent – whether or not true in any given case – to complain that the President, or a majority in Congress, has acted “undemocratically.” If so, then a fortiori the same sort of complaint is valid, whether or not true, when applied to appointed judges. And in any event, the lag time until the judges do follow the election returns may be so great as to make the argument cold comfort, democratically speaking, for any given generation. In the long run we are all democrats, but life is a succession of short runs.

If the foregoing is even roughly correct, there is a real democratic deficit surrounding conventions. It follows, rather more easily, that regime (2) -- the incorporationist regime, in which the generation of conventions is decentralized but there is centralized judicial enforcement -- is even worse than regime (1), the classical Diceyan regime in which both generation and enforcement of conventions is decentralized. Centralized enforcement of democratically-suspect decentralized norms constrains the ability of nonjudicial actors to change conventions by violating them, historically a major mechanism of constitutional adjustment over time, and one that offers a kind of safety valve against obsolete, oppressive or unjust conventions. Indeed there is something faintly Kafkaesque about a regime of “constitutional” rules that are generated nowhere in particular, by no one in particular, that cannot be changed through any regular organized procedure and that have no systematic virtues, yet are rigorously enforced by a professional and bureaucratized judiciary. It is as though the judges rigorously enforced commands that happened to be thrown up by a Boggle word generator.

International customary law. A brief word about international customary law. The classical test of custom – the regular behavior of states plus opinio juris, or the sense of binding obligation – is essentially the same as the test for conventions.<sup>62</sup> And there is precisely the same worry about the democratic deficit of international custom. A canonical critique of customary international law observes that enforcing international custom in domestic courts is in severe tension with the premises of representative democracy, because and to the extent that international custom has not been incorporated into law by the deliberate decision of a democratically accountable institution.<sup>63</sup> Whether that argument is right or wrong, as a matter of democratic theory or constitutional theory, is irrelevant for our purposes. The point is just that the issue is the same; the enforcement of domestically-generated convention by domestic courts faces the same democratic deficit as the enforcement of internationally-generated custom by domestic courts.

Conclusion: The Nonideal Virtues of the Commonwealth View

My basic suggestion is that U.S. public law should explicitly adopt the modern Commonwealth approach, which allows courts to recognize conventions but not to enforce them. I have also suggested that current law already reflects this approach, to some degree, although it is true that there is no consistent, well-defined theory in U.S. public law about how courts should relate to convention in their decisionmaking. Still, the Supreme Court's recent decision in Free Enterprise Fund is defensible, if at all, only on an implicit theory that allows conventions to be recognized but not enforced.

The main argument I have offered is that the modern Commonwealth view amounts to an indispensable nonideal theory of judging in the administrative state – a world crowded with statutes, regulations and conventions, which continually jostle one another. To recognize conventions is unavoidable, because so many judicial decisions on public law will bump up against conventions in one way or another; strict judicial blindness to convention is not a real option. Yet to enforce conventions outright is normatively objectionable, principally because conventions suffer from a severe democratic deficit and have no systematic offsetting benefits. A regime in which courts have nothing to do with conventions is infeasible, and a regime in which

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<sup>62</sup> Jo Lynn Slama, *Opinio Juris in Customary International Law*, 15 OKLA. CITY U. L. REV. 603 (1990).

<sup>63</sup> Curtis A Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, at 857-59 (1996-1997).

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courts actively enforce conventions would be intolerable. It follows that the modern Commonwealth view is the best of the available alternatives. It is neither fish nor fowl, neither the classical Diceyan regime nor the incorporationist regime. Its virtue – a large and sufficient virtue -- is that it is not any of the other views, which are exposed to even more powerful objections.

In any event, whatever the ultimate merits of the competing regimes, I believe the crucial analytic issue about the role of conventions in court is the question whether norms generated through decentralized processes should be given centralized enforcement. So there is an analytic thesis here as well, one that stands or falls independently of my substantive thesis. It is perfectly possible, as a logical matter, to reject the substantive view while accepting the analytic framework that underpins it.